

IN THE HIGH COURT OF CHHATTISGARH AT BILASPUR (C.G.)

Criminal Appeal No. 1011 /2002.

APPELLANTS
ACCUSED
(In Jail)

- : (1) Anil alias Mangu S/o Lakhamu
age 27 years, Occupation -
Driver, R/o Bazarpara Bhairamgarh.
- (2) Sanju alias Sanjay S/o Sarju
Singh, age 24 years, Occupation -
Driver, R/o Bus Stand Bhairamgarh.
- (3) Manoj Singh S/o Bharat Bhushan
aged 25 years, Occupation -
Agriculture, R/o Bazarpara
Bhairamgarh, Distt. Dantewada
(C.G.).

VERSUS

RESPONDENT

- : State of Chhattisgarh through
P.S. Bhairamgarh, Distt. -
Dantewada (C.G.).

APPEAL UNDER SECTION 374(2) OF CODE OF CRIMINAL PROCEDURE

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Advocate
R. to D.R. (J)

A.F.R.

HIGH COURT OF CHHATTISGARH AT BILASPUR

Cr. Appeal No.1011/2002

Anil Alias Mangu & others

Vs.

State of Chhattisgarh

Post for Judgment: 07.08.2006

**Sd/-
Dilip Raosaheb Deshmukh
Judge**

07.08.2006

HIGH COURT OF CHHATTISGARH AT BILASPUR**Cr. Appeal No. 1011/2002****Before: Hon'ble Shri Dilip Raosaheb Deshmukh, J.****Anil Alias Mangu & others****Vs.****State of Chhattisgarh****Present:-****Shri Abhay Tiwari, learned Counsel for the appellants No.1 & 2.****Shri Manoj Mishra, learned Counsel for the appellant No.3.****Shri Ashish Shukla, learned Govt. Advocate for the State.****JUDGMENT****(Delivered on 07.08.2006)**

This appeal is directed against the judgment dated 1.8.2002 delivered by Shri R.S.Sharma, Special Judge, (S.C/S.T. Act), Bastar at Jagdalpur in Sessions Case No.472/2001 whereby the appellants were convicted under Section 376 (2) (g) I.P.C. and Section 3 (1) (xii) of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 (hereinafter referred to as the Act of 1989) and sentenced to undergo rigorous imprisonment for ten years and fine of Rs.4,000/- and in default to undergo additional rigorous imprisonment for two years under Section 376(2)(g) I.P.C. and to undergo rigorous imprisonment for 3 years and a fine of Rs.2000/- and in default to undergo additional rigorous imprisonment for nine months under Section 3 (1) (xii) of the Act of 1989.

2. During course of hearing, it was not disputed that the prosecutrix belongs to the Scheduled Tribe (Gond caste). It was also not disputed that the prosecutrix had accompanied the appellants in the Jeep towards the jungle on 12.7.2001 at about 5.00 P.M.

3. Briefly stated the prosecution story is that the prosecutrix is a widow and is handicapped. On 12.7.2001 at about 5.00 P.M. the prosecutrix while returning from the Mill with Mahesh P.W.5 stopped on way since Mahesh had to purchase a copy. At that time, appellant Anil @ Mangu came there in a Jeep. The appellant was known to the prosecutrix since he often used to visit her house. The appellant-Anil @ Mangu asked the prosecutrix, if she wanted to go to Marwada and bringing the Jeep near her and made her sit in the Jeep. Appellant Sanjay @ Sanju and Manoj Singh also sat in the Jeep on both sides of the prosecutrix. The prosecutrix asked Anil to wait for Mahesh but appellant-Anil @ Mangu drove the Jeep towards Marwada. On way, appellant-Anil took the Jeep towards the forest. The appellant Manoj and Sanjay @ Sanju started fondling the prosecutrix by kissing her and pressed her breasts. On reaching the jungle, all the appellants forcibly took the prosecutrix out of the jeep. Appellant-Sanjay removed the saree, saya and underwear of the prosecutrix and after undressing himself, committed rape on the prosecutrix while appellant Anil @ Mangu and Manoj forcibly held the prosecutrix. At this juncture, Ajay, brother of the appellant Sanjay and another person arrived on a motor cycle. Seeing them, appellant-Sanjay and Manoj started to run away. Ajay, scolded appellant-Anil as to why they brought the girl and asked the appellants to reach the girl home. Thereafter, the appellant got the prosecutrix seated in another Jeep going towards Marwada. At evening, the prosecutrix reached the house of her relative namely Jaggu Dada and met Champa P.W.6, her sister-in-law but did not inform about the occurrence. On the next date i.e. 13.7.2001, the prosecutrix informed Champa P.W.6 about the incident who in turn told Jaggu Dada. Jaggu Dada accompanied the prosecutrix to Police Station, Bhairamgarh situated 5 kilometers away where the prosecutrix lodged F.I.R. at 4.00 P.M.

4. On 14.7.2001, seven red and green coloured pieces of bangles and three white pieces of bangles with blue linings were seized vide Ex.P.2 from the Kurremarka forest i.e. the place of occurrence. One yellow saree, one pink petticoat, one red underwear and two green bangles with red linings were seized from the prosecutrix vide Ex.P.3. The prosecutrix was sent for medical examination. Dr. Smt. Suchita James P.W.8 who examined the prosecutrix on 14.7.2001 at 5.00 P.M. found that she was having pain in her private parts and her hymen was destroyed and active bleeding was present through vaginal orifice. She also found abrasion $\frac{1}{4}$ " x $\frac{1}{4}$ " over right shoulder and another abrasion $\frac{1}{4}$ " x $\frac{1}{4}$ " over right elbow joint of the prosecutrix. Vaginal smear was taken. Slides were sealed and handed over to Constable which in turn were seized vide Ex.P.4. Dr. Smt. Suchita James referred the case to Gynecologist at Maharani Hospital, Jagdalpur. She also examined the saree, petticoat and underwear of the prosecutrix but did not find any stains on the saree. Whitish stains were seen on the petticoat and underwear of the prosecutrix. Chemical analysis was advised for confirmation of presence of semen and human spermatozoa. Dr. Smt. Manorama Tiwari P.W.2, Gynecologist, Maharani Hospital, Jagdalpur examined the prosecutrix on 17.7.2001 but did not find any injury on the vulva and perineum. No bleeding was present at the time of her examination per vagina.

5. Appellant-Sanjay Singh was sent for medical examination. Dr. Gajendra Singh Dhruw P.W.3 examined him on 16.7.2001 and found that he was capable of performing sexual intercourse. No internal and external injury was seen on penis. One Jeans full pant, one underwear and one half "T" shirt were removed from the body of the appellant and were seized vide Ex.P.5. After completion of investigation, appellants were prosecuted for committing gang rape on the

prosecutrix, a woman belonging to the Scheduled Tribe. During trial the prosecution did not produce the report of F.S.L. to establish presence of semen or human spermatozoa on the vaginal slides or the clothes of the prosecutrix and the appellant-Sanjay.

6. The appellants abjured their guilt, pleaded innocence and led no evidence in defence. The prosecution examined as many as eight witnesses. Relying upon the testimony of the prosecutrix duly corroborated by Dr. Suchita James P.W.8, Mahesh P.W.3 and Champa P.W.6, the learned trial Judge convicted and sentenced the appellants as aforesaid in para - 1.

7. Shri Abhay Tiwari and Shri Manoj Mishra, learned counsel for the appellants argued that the testimony of the prosecutrix that all the three appellants had committed rape on her was wholly unworthy of credit since not only in the first information report but also in her statement under Section 161 Cr.P.C. the prosecutrix did not mention about rape having been committed on her by the appellants - Anil @ Mangu and Manoj. So far as the allegation levelled in the first information report regarding these two appellants fondling the prosecutrix, kissing her and pressing her breasts, in her testimony she did not say a word about this. The prosecution neither examined the Investigating Officer nor proved the F.I.R. lodged by the prosecutrix for which an adverse inference ought to have been drawn against the prosecution. It was also contended that Ajay and the person accompanying him on the motorcycle who saw the appellants with the prosecutrix in the forest immediately after the occurrence, were not examined by the prosecution. Learned counsel for the appellants also argued that the driver of the Jeep who brought the prosecutrix to Marwada was also not examined by the prosecution. The admission of the prosecutrix in paragraph 9 that she did not

narrate the incident to anybody at home or any person sitting in the Jeep while returning from the place of occurrence rendered her unworthy of credit. It was also pointed out that the prosecutrix had stated in paragraph 6 that she had merely lodged a report of her being fondled (Chhedkhani) by the appellants. Learned counsel for the appellants also contended that adverse inference ought to be drawn against the prosecution for not producing the report of F.S.L., a material piece of evidence because if the three appellants had gang raped the prosecutrix, her vaginal slide would have shown presence of semen and human spermatozoa. Shri Abhay Tiwari, learned counsel for the appellants-Anil and Sanjay contended that the possibility that the appellant Sanjay had committed sexual intercourse with the prosecutrix with her consent could not be ruled out. Reliance was placed on Jinishlal Sah v. State of Bihar 2003 (1) C.G.L.J. 138 to support the contention that the prosecutrix had voluntarily accompanied the appellants and sexual intercourse with the prosecutrix by the appellant-Sanjay was wholly with her consent and did not amount to rape. Reliance was also placed in Suresh N. Bhusare & Ors. V. State of Maharashtra 1998(6) Supreme 463 while contending that the material inconsistency in the evidence of the prosecutrix and F.I.R. lodged by her also rendered her unworthy of credit. Lastly, reliance was placed in Devinder Singh and others v. State of H.P. A.I.R. 2003 Supreme Court 3365 while arguing that the testimony of the prosecutrix that she was raped forcibly by three young persons after removing her clothes was wholly unreliable since no injury or tenderness was found in the genital area. Thus, the medical evidence could not affirmatively show that the prosecutrix was subjected to sexual assault, as alleged. It was also contended that naming only appellant-Sanjay in the first information report as also in her statement under Section 161 Cr.P.C. as the person

committing rape on her casts a serious doubt on the veracity of the prosecutrix while she deposed that all the appellants had raped her. On these premises, it was urged that the appellants were entitled to be acquitted. In the alternative, it was also urged by Shri Abhay Tiwari, learned counsel for the appellant-Sanjay that the sentence awarded by the learned trial Judge to appellant Sanjay was too harsh and should be reduced to the minimum sentence of 7 years under Section 376 I.P.C. Reliance was placed on State of Rajasthan v. Kishanlal 2002 C.L.T. (SC) 124.

8. On the other hand, Shri Ashish Shukla, learned Government Advocate argued in support of the impugned judgment while contending that the prosecutrix did not know Hindi and an interpreter was used even while recording her evidence. Therefore, it was possible that while recording the F.I.R. and her statement under Section 161 Cr.P.C. the omission to record the factum of rape having been committed by the appellant-Anil @ Mangu and Manoj could have occurred. He contended that despite the above omissions the testimony of the prosecutrix P.W.4 was corroborated by Champa P.W.6. It was also contended that the testimony of Dr. Smt. Suchita James P.W.8 wholly corroborated the testimony of the prosecutrix that she was gang raped by the appellants. It was also contended that the evidence of the prosecutrix clearly revealed that the appellants were in a position to dominate the will of the prosecutrix, a member of the Scheduled Tribe and had sexually assaulted her in furtherance of a common design. On these premises, it was urged that conviction and sentence awarded by the learned trial Judge was well founded and did not call for any interference.

9. Having considered the rival submissions, I have minutely perused the evidence on record. The prosecutrix P.W.4 aged about 28

years deposed that while Mahesh had gone to purchase a copy she was sitting in the Hotel. The appellants came there in a Jeep and took her towards the forest despite her request to wait till Mahesh arrived. She asked the appellants the reason when she was made to alight from the Jeep in the forest. She deposed that thereafter the appellants took her to the forest where all the three appellants committed rape on her. She further deposed that she had shouted but in vain and the appellants had forcibly raped her one after the other. Thereafter, the appellants brought her towards the Jeep, got her seated and left her at Marwada. In cross-examination, she stated that Manoj was the first to commit sexual intercourse with her. Her testimony that she did scratch and bit Manoj causing injuries on Manoj is not worth credence because neither the prosecution had sent Manoj for medical examination during investigation nor did the prosecutrix state in the F.I.R. or in her statement under Section 161 Cr.P.C. that Manoj had committed sexual intercourse with her.

10. In cross-examination para - 8, she further deposed that after Manoj, the appellant-Anil @ Mangu committed sexual intercourse with her. She stated that after the sexual assault committed by Manoj, she was again made to lie down forcibly and thereafter appellant Anil @ Mangu had committed sexual intercourse with her. However, this part of the testimony of the prosecutrix is also rendered unworthy of credit because in the first information report as also in her statement recorded under Section 161 Cr.P.C. Ex.D.1 she did not narrate about rape by appellant-Anil @ Mangu.

11. So far as the allegations made by the prosecutrix in the F.I.R. that the appellants-Anil @ Mangu and Manoj were fondling her, kissing her and pressing her breasts while she was being taken towards the forest by driver appellant-Sanjay, are concerned, no such question

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was put to the prosecutrix during her testimony. It is here that the vital role of the trial Judge comes in to play. The witness before him was a Tribal, not knowing Hindi and being examined through an interpreter on whose ability to translate, the Court was dependent while appreciating her evidence. In such cases, the Court should note the demeanor of the witness, record her evidence by question and answer method so that the record shows that she was asked about the relevant facts of the case and her demeanor to the questions noted. It is noteworthy that the prosecutrix while being taken by the appellants in the Jeep had asked the appellants "ऐसे क्यों कर रहे हो" meaning thereby "why they were behaving her in that fashion". It is here that the contention of the learned Government Advocate that the fact that the prosecutrix did not understand Hindi and was perhaps not asked by the Prosecutor and the interpreter, explained the omission in her testimony regarding the appellants Anil @ Mangu and Manoj fondling kissing and pawing her, as mentioned by her in the F.I.R. as also in her statement under Section 161 Cr.P.C.

12. The testimony of the prosecutrix that the three appellants had taken her to the forest in the Commander Jeep driven by the appellant-Sanjay while she objected is wholly unrebutted during cross-examination. In cross-examination she also narrated that while she was being raped, the other appellant Mangu had caught hold of her. Here again the Trial Judge remained a silent spectator and recorded evidence mechanically. He ought to have intervened to get the facts clarified. Her testimony that she was forcibly ravished by the appellant Sanjay is also wholly unrebutted. A specific suggestion given by the defence in cross-examination of the prosecutrix clearly lends support to her testimony that the three appellants had taken her to the forest in the Jeep driven by appellant Sanjay. It also

establishes that while she was being ravished the appellant Mangu had caught hold of her.

13. It is thus clearly borne out from the testimony of the prosecutrix that the appellants had forcibly taken her to the forest in the Jeep driven by the appellant-Sanjay and appellant-Sanjay had forcibly committed rape on the prosecutrix while the appellants Anil @ Mangu held her and Manoj stood by. This also finds corroboration from the first information report lodged by the prosecutrix wherein she had narrated that while Anil and Manoj had held her, appellant-Sanjay had forcibly ravished her after undressing her completely. As admitted by the prosecutrix to a question put by the defence, it appears plausible that after the appellant Sanjay committed sexual intercourse with the prosecutrix with the assistance of the co-appellants, his brother Ajay and another person arrived at the spot and scolded them, whereafter the prosecutrix was put in another Jeep by the appellants to return home.

14. The testimony of the prosecutrix also finds corroboration from the testimony of Champa P.W.6 who stated that the prosecutrix had told her that the appellants had taken her and after undressing her, outraged her modesty. It is true that the prosecutrix did not narrate the incident to her sister-in-law immediately on returning home and narrated the incident to her on the next day but it is the natural conduct of a woman who has been ravished. No adverse inference can be drawn on this ground. The very fact that the prosecutrix narrated the incident to Champa and went to lodge F.I.R. at P.S. Bhairamgarh on the very next day i.e. 13.7.2001 with Jaggu Dada and lodged a truthful report of gang rape committed on her only by appellant Sanjay with the active assistance of appellants Anil @ Mangu and appellant-Manoj Singh gives credence to the testimony of the prosecutrix. Dr. Smt.

Suchita James P.W.8 who examined the prosecutrix on 14.7.2001 also found that the prosecutrix was experiencing pain in her private parts and was bleeding through the vaginal orifice. She also found an abrasion $\frac{1}{4}$ " x $\frac{1}{4}$ " on her right shoulder and another abrasion on the right elbow joint of the same size. Thus, the testimony of the prosecutrix is also fully corroborated by medical evidence.

15. It is well settled that merely because the testimony of the prosecutrix is exaggerated in one aspect, it cannot be wholly thrown out of consideration since the maximum *falsus in uno falsus in omnibus* has been exploded long back as a myth. It is also well settled by a catena of decisions of the Apex Court that in an offence of rape, the testimony of the prosecutrix is not to be treated at par with that of an accomplice but her testimony is to be considered at par with that of an injured witness and conviction can be based on the sole testimony of the prosecutrix if it inspires confidence and is worthy of credence.

16. Having considered the evidence led by the prosecution minutely and after perusal of the record with circumspection, I am of the considered opinion that the fact that the prosecutrix was taken by all the three appellants in the Jeep to the forest where after undressing her completely the appellant Sanjay ravished her with the active assistance of co-appellants Manoj and Anil is wholly worthy of credit. During cross-examination, the questions asked by the defence lend support to her testimony. Merely because her testimony is found to be exaggerated in so far as the actual commission of rape by appellant Anil @ Mangu and Manoj is concerned, her entire testimony cannot be labelled as unworthy of credit. Testimony of Mahesh Kumar P.W.5 also lends corroboration to the testimony of the prosecutrix that she

was taken by the three appellants in the Jeep towards the forest and on her return the prosecutrix had told him about being threatened to be killed by the appellants which has also remained wholly unrebutted. Lekami Chaituram P.W.5 also proved the seizure of broken bangles from the place of occurrence. Dr. Gajendra Singh Dhruw P.W.3 has proved that upon medical examination he found the appellant-Sanjay capable of performing sexual intercourse. It is also wholly unrebutted in cross-examination. The testimony of Smt. Manorama Tiwari that she had examined the prosecutrix on 17.7.2001 i.e. 5 days after the occurrence, at Maharani Hospital, Jagdalpur and did not find any injury or bleeding from the vaginal orifice of the prosecutrix is wholly inconsequential and does not come to the aid of the defence in any manner since she examined the prosecutrix after 5 days. Dr. Suchita James P.W.8 has proved the external injuries found on the right shoulder and right elbow joint of the prosecutrix as also the pain on her private parts and bleeding from the vaginal orifice which proves the violent sexual assault on the prosecutrix by appellant Sanjay as also the fact that before committing rape the prosecutrix was undressed by the appellants. It is pertinent to note that in cross-examination a specific leading question was asked by the defence that Ajay, brother of the appellant Sanjay had scolded the appellants in the forest as to why had they brought the prosecutrix in the forest. To reiterate, the entire cross-examination of the prosecutrix in a manner lends support to the inference that rape was committed on the prosecutrix by appellant Sanjay with the active assistance of co-appellant-Anil @ Mangu and Manoj. It is thus established that the appellants had taken the prosecutrix to the forest in a Jeep with the intention of subjecting her to sexual intercourse and the appellant Anil @ Mangu had held the prosecutrix while she was being ravished by appellant Sanjay. Even though there is no specific allegation in the

testimony of the prosecutrix that the appellant Manoj had held her while she was being ravished by the appellant-Sanjay, yet the very fact that the appellant Manoj and Anil @ Mangu went with the prosecutrix to the forest in a Jeep driven by appellant Sanjay and in presence of appellant Manoj, the appellant Anil @ Mangu held the prosecutrix clearly goes to show that all the appellants were in fact acting in furtherance of their common intention of committing rape on the prosecutrix, and therefore, under Explanation - 1 to sub-section (2) of Section 376 I.P.C. all the appellants shall be deemed to have committed gang rape on the prosecutrix within the meaning of section 376 (2) (g) I.P.C. The active part taken by the appellants Anil @ Mangu and Manoj while the prosecutrix was being ravished by the appellant Sanjay can very safely be inferred while sifting the testimony of the prosecutrix in para 8 with care and caution so as to separate the grains of truth.

17. The contention of Shri Abhay Tiwari, learned counsel for the appellants that the appellant Sanjay had committed sexual intercourse with the prosecutrix with her consent is unacceptable. Her testimony clearly shows that she had raised objection to her being taken to the forest by the appellants. The testimony of Mahesh P.W.5 also shows that the appellants had threatened to kill her, if she resisted. Medical evidence of Dr.Smt. Suchita James P.W.8 also shows the presence of external injuries as also the presence of bleeding from the vaginal orifice and pain in her private parts. These factors clearly rule out consent of the prosecutrix.

18. The fact that the prosecutrix did not narrate the incident to the occupants of the Jeep in which she returned home as also the fact that she did not narrate the incident immediately on returning home

to her sister-in-law does not in any manner render the testimony of the prosecutrix unworthy of any credit. It cannot be ruled out that in a tradition bound conservative society, the prosecutrix to hide her shame, would not have gathered courage to disclose the incident to her sister-in-law Champa P.W.6 immediately on returning home. The very fact that the prosecutrix narrated the incident to her on the next morning and accompanied her to lodge the F.I.R. at P.S. Bhairamgarh clearly rules out the consent of the prosecutrix in the gang rape on her by appellant Sanjay with the assistance of the co-appellants who were acting in furtherance of their common design. Nothing has emerged in her entire cross-examination to show that she bears any grudge against the appellants or had any motive to falsely implicate them. If the prosecutrix had voluntarily gone with the appellants and had consented to the sexual act committed upon her by appellant Sanjay, she would not have narrated the incident to her sister-in-law on the next day and would not have gone to lodge a prompt F.I.R. at Police Station Bhairamgarh on the next day. The very fact that the prosecutrix while lodging F.I.R. and also during her statement under Section 161 Cr.P.C. truthfully narrated that she was raped only by the appellant-Sanjay though with the active assistance of co-appellants Anil @ Mangu and Manoj renders her testimony regarding being taken by the appellants in a Jeep to the forest and being ravished by the appellant Sanjay with the active assistance of the appellant Anil @ Mangu and Manoj is wholly worthy of credence.

19. The testimony of the prosecutrix, a woman belonging to the Scheduled Tribe, leaves no room for any doubt that the appellants were in a position to dominate her will while she was being taken to the forest and sexually assaulted by appellant Sanjay with the assistance of co-appellants Anil @ Mangu and Manoj.

20. The case law cited by the appellants does not come to their rescue in any manner. It has been held that the appellant-Sanjay alone forcibly committed sexual intercourse with the prosecutrix with the active assistance of the co-appellants. Medical evidence revealed that the prosecutrix had external injuries as also bleeding from her vaginal orifice and pain in her private parts. It has also been held that the appellants-Anil @ Mangu and Manoj did not actually commit sexual intercourse with the prosecutrix although they accompanied Sanjay in the Jeep and assisted him while he committed rape on the prosecutrix. In this view of the matter, the case law cited in *Suresh N. Bhusare & Ors (supra)* does not help the defence in any manner since the facts are clearly distinguishable. Similarly, the defence does not derive any benefit from the case of *Devinder Singh and others (supra)* since the facts of the case cited are clearly distinguishable.

21. Having thus considered the evidence led by the prosecution in its entirety, I am of the considered opinion that the conviction of the appellants for the offence under Section 376 (2) (g) I.P.C. and under Section 3 (1) (xii) of the Act and the sentence awarded thereunder are well founded and do not call for any interference whatsoever.

22. In the result, the appeal being devoid of merit is dismissed.

Sd/-
Dilip Raosaheb Deshmukh
Judge